

# Fear and Loathing in Persuasive Writing

## An Empirical Study of the Effects of the Negativity Bias

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### I. Introduction

*People naturally prefer positive people to negative ones. They naturally respond better to those who are kind than those who are not. Logically, then, the ideal strategy for a candidate would be to make his or her campaign as positive and as cordial as possible.*<sup>1</sup>

One might wish that the sentiment expressed above by a hopeful graduate student were true. It seems to make intuitive sense. However, those words were penned a full year before the unexpected outcome of the

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<sup>1</sup> Peter A. Gregory, *Comparing the Effectiveness of Positive and Negative Political Campaigns*, 7(11) INQUIRIES J. (2015), <http://www.inquiriesjournal.com/a?id=1311>. At the time of publication, the author was seeking a master's degree in public administration at Brigham Young University.

2016 U.S. presidential election, in which the candidate who ran the most negative, attack-filled campaign in recent memory won the office against a candidate whose campaign motto was “Love Trumps Hate.”<sup>2</sup>

Politics is a form of persuasion, of course. So what does it say about the human psyche when the most negative campaigner in a field of seventeen candidates rises to the top and wins not only his party’s nomination, but the office itself? More importantly, are the lessons from the political arena transferable to another form of persuasion: written legal advocacy?

I have written previously about the human brain’s inherent negativity bias.<sup>3</sup> The term “negativity bias” refers to the brain’s natural inclination to attend to and process negative stimuli. Part II of this article will provide a brief summary of that phenomenon. At the end of my previous article, I posed some questions about how the negativity bias might influence the selections that legal writers might make, and suggested that some empirical evidence might help advocates craft the most powerful messages for their clients.

This article reports the results of an eighteen-month-long empirical study that I conducted, investigating the power of negative themes in written advocacy. I wrote a series of nine preliminary statements about a hypothetical case. Eight of those statements embodied either a positive or a negative theme, as I will describe below; the ninth was simply a neutral recitation of the procedural posture of the case. I then recruited 163 judges from different jurisdictions and in different types of courts, and asked each of them to read one of the nine different preliminary statements as well as a stipulation of facts common to all nine test conditions. I then sought to measure what effect, if any, the negative stimuli in the preliminary statements might have had on the judge’s perception of the case.

Part III of this article first describes the test instrument that I designed, then concludes by describing the administration of the test, from recruitment of test participants to the gathering and collating of the data. Part IV then reports the results of that test. Finally, in Part V, I provide some analysis of what I think the results show.

Perhaps unsurprisingly, the bottom-line findings are complex. In some situations, negative themes seem to be important in priming a reader to disfavor the opposing party; in other situations negative themes backfire. For example, a negative theme seems to focus the judge’s

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<sup>2</sup> The fact that Hillary Clinton actually won more popular votes, however, might still give the student (and perhaps some readers of this article) a measure of solace.

<sup>3</sup> Kenneth Chestek, *Of Reptiles and Velcro: The Brain’s Negativity Bias and Persuasion*, 15 NEV. L.J. 605 (2015).

attention on the facts of the case, while a positive theme tends to focus the judge's attention on the law. Also, a negative theme might help a weaker party attack a large, more powerful adversary, but when the more powerful adversary uses a negative theme, the judge might instead be inclined to protect the weaker party.

Several things do appear to be consistent, however. First, priming (using a Preliminary Statement summarizing the case and the themes the advocate will present) as the very first thing a reader sees seems to have a great deal of persuasive impact. And second, presenting a negative theme tends to focus the reader's attention on the facts of the case, while using a positive theme tends to focus the reader's attention on the law. Thus, if an advocate feels she has a stronger fact-based argument, she may choose a negative theme, while if she feels her law-based arguments are stronger, she may choose a positive theme instead.

## II. The Science of the Negativity Bias

Cognitive psychologists have been studying the negativity bias for many years. One of the first studies to identify the bias was published in 2001, when a group of cognitive psychologists at Case Western Reserve University surveyed all of the then-current studies that compared the relative strength of positive and negative stimuli.<sup>4</sup> Many of the studies surveyed in the Case Western study suggest that negative information is retained longer and affects us more because it is processed by the brain more thoroughly. This is possibly because it is evolutionarily adaptive behavior.<sup>5</sup> That is, bad things can kill us, while good things generally cannot. Organisms that are more attuned to detecting and reacting to bad things are therefore more likely to survive.

Because the negativity bias is thought to be an evolutionary adaptation, it is very deeply seated in our psyches. It probably resides in the amygdalae, the portion of the brain that is closely associated with emotional processing and fear responses.

Neuroscientist Paul MacLean first developed the theory that our brains evolved in three stages, which he called the "triune brain."<sup>6</sup> The first brain structure to evolve was what he termed the "protoreptilian formation" or R-complex (which many people now refer to as the "reptilian brain").<sup>7</sup> The reptilian brain controls involuntary motor

<sup>4</sup> Roy Baumeister et al., *Bad Is Stronger than Good*, 5 REV. OF GENERAL PSYCHOLOGY 323 (2001).

<sup>5</sup> *Id.* at 325.

<sup>6</sup> P.D. MACLEAN, *THE TRIUNE BRAIN IN EVOLUTION: ROLE IN PALEOCEREBRAL FUNCTIONS* (1990).

<sup>7</sup> *Id.* at 15.

movements, instinctive behaviors, as well as the so-called “fight or flight” response; its primary function is self-preservation of the organism.<sup>8</sup> Next, the paleomammalian brain (also called the “limbic system”) evolved, primarily involved with controlling emotional responses.<sup>9</sup> MacLean points out that the limbic system can serve as a sort of “amplifier” for guiding behavior required for self-preservation and preservation of the species (a function also found in the reptilian brain).<sup>10</sup> Finally, the neomammalian brain (also called the “neocortex”) evolved, responsible for rational thought.<sup>11</sup> Unlike the reptilian brain and limbic system, the neocortex is primarily oriented toward the external world.<sup>12</sup>

MacLean acknowledges that all three systems are interrelated and to some degree interdependent;<sup>13</sup> more-recent studies confirm that the three systems must work together.<sup>14</sup> However, the basic concept of the triune brain is still useful in thinking about the importance of both the reptilian brain and the emotional brain (limbic system) on the logical brain (the neocortex). For example, one explanation of the emotional brain is that it evolved so as to make us feel fear or pleasure in order to do what the reptilian brain deems necessary for survival.<sup>15</sup> And as neuroscientist Antonio Damasio and others have demonstrated, the logical brain literally

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**8** For a more colorful, albeit less scientific, explanation of the function of the reptilian brain, see DAVID BALL & DON KEENAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF’S REVOLUTION (2009). They base their conclusions on MacLean’s “triune brain” theory. *Id.* at 13. They write,

The Reptilian brain houses basic life functions, such as breathing, balance, hunger, the sex drive, and the fundamental life force: survival. The Reptile does not tend to these functions solely to keep you alive. Her larger purpose is to keep your genes alive and spread as many of them as possible into future generations. This impulse drives all life. Even people who want no children cannot normally get rid of the Reptilian imperative of personal survival. Nor can they get rid of the Reptilian drives that the Reptile has developed for the creation and nurturing of children (such as the sex drive).

We like to believe we are run by logic and emotion. Sometimes we are. But when something we do or don’t do can affect—even a little—our safety or the propagation and safety of our genes, the Reptile takes over. If your cognitive or emotional brain resists, the Reptile turns it to her will. The greater the perceived danger to you or your offspring, the more firmly the Reptile controls you.

In other words, the Reptile invented and built the rest of the brain, and now she runs it.

*Id.* at 17. This may explain in part why negative campaign ads are so effective. If they demonstrate a threat to the viewer or the viewer’s offspring, the reptilian brain automatically kicks in and takes defensive measures. Thus, a negative appeal such as “Don’t ever vote for that other candidate who poses such a threat!” may be effective in political campaigns. And as the recent presidential campaign showed, even a negative appeal disguised as a positive might work: “Vote for me because [only?] I can protect you from all those other threats!”

**9** MACLEAN, *supra* note 6, at 16–17.

**10** *Id.* at 17.

**11** *Id.* at 17–18.

**12** *Id.* at 17.

**13** *Id.* at 9. MacLean also points out that these three systems evolved in that order. *Id.*

**14** See, e.g., JOSEPH DECOUX, THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE 98–101 (1996); ANTONIO DAMASIO, DESCARTES ERROR: EMOTION, REASON AND THE HUMAN BRAIN 1–79 (1994).

**15** BALL & KEENAN, *supra* note 8, at 19.

cannot function without input from the emotional brain.<sup>16</sup> We cannot escape our instincts.<sup>17</sup>

One group of scholars has recently concluded that judges are influenced to some degree by emotional content, despite their best efforts to avoid it. Judge Andrew Wistrich and Professors Jeffrey Rachlinski and Chris Guthrie ran a series of experiments at judicial-education seminars between 2008 and 2013, getting 1,800 total responses to a series of six different hypothetical cases that the judges were asked to “decide.” In each experiment, judges were asked to render a ruling using the identical law, but some judges were asked to rule in the case of a sympathetic party and other judges were asked to rule in the case of an unsympathetic party. The divergent rulings reported by the judges led the researchers to find what they called “clear evidence that emotions influence judges.”<sup>18</sup>

To sum up, the negativity bias is an evolutionary adaptation that helps organisms avoid or respond to danger. The bias is deeply rooted in the brain’s limbic system, and involves the emotional brain. Since emotional thinking is closely related to, and necessary for, logical reasoning, it is unlikely and probably impossible for one’s rational brain to completely overrule the emotional brain—of which the negativity bias is an important part.<sup>19</sup>

### III. The Test Instrument

So what might this mean for advocates? Judges (and some scholars) frequently admonish advocates to not “go negative.”<sup>20</sup> But if negative

<sup>16</sup> See generally DAMASIO, *supra* note 14.

<sup>17</sup> Ball and Keenan put this more colorfully: “Logic cannot budge a Reptile out of survival stance.” BALL & KEENAN, *supra* note 9, at 26. Their point is that once the reptilian brain detects a danger that it believes is a threat to its survival, or the survival of its community, the reptilian brain springs into action and overrides both the limbic system and the neocortex (the logical brain). (In fact it may even recruit the limbic system as a means of overcoming the logical brain.)

<sup>18</sup> Andrew Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 898 (2015).

<sup>19</sup> For a more comprehensive treatment of the negativity bias, see Chestek, *supra* note 3.

<sup>20</sup> See, e.g., Hon. Gerald Lebovits et al., *Winning the Moot Court Oral Argument: a Guide for Intramural and Intermural Moot Court Competitors*, 41 CAP. U. L. REV. 887, 903 (2013) (advising moot-court competitors that “a winning theme addresses the positive policy implications of a ruling in the advocate’s favor”); Hon. Frank Easterbrook, *Friedman Lecture in Appellate Advocacy*, 23 FED. CIR. BAR J. 1, 6 (2013) (suggesting that advocates confront their opposing counsel’s counterarguments by dealing with them as part of your “positive theme” of the case); Laurie Lewis, *Winning the Game of Appellate Musical Shoes: When the Appeals Band Plays, Jump from the Client’s to the Judge’s Shoes to Write the Statement of Facts Ballad*, 46 WAKE FOREST L. REV. 983, 1017 (2011) (recommending that brief writers emphasize good facts and de-emphasize bad facts to cast the client in a positive light); Hon. Jane Roth and Mani S. Walia, *Persuading Quickly: Tips for Writing an Effective Appellate Brief*, 11 J. APP. PRAC. & PROCESS 443, 445–46 (2010) (recommending that advocates present both legally relevant facts and additional facts that add to the human interest in order to portend a positive client in a positive light); Hon. Gerald Lebovits, *The Legal Writer: Free at Last From Obscurity: Clarity—Part 2*, 76 J. N.Y. ST. B.J. 64 (2004) (again advocating that lawyers “writ[e] in the positive”); Steven Merican, *Thoughts from an Unconstrained Practitioner: Writing an Appellate Brief, or How to Make Tax Law an Interesting Read*, 19 DCBA BRIEF 10 (2007) (arguing that “[r]eadability and persuasiveness are improved by being assertive and positive”). The list could go on indefinitely.

stimuli are that much stronger than positive stimuli as the psychology research suggests, wouldn't advocates be better served by choosing negative themes and attacking the other side? It seemed to me this question could be answered empirically by asking judges. However, a direct question ("Do you think advocates should choose negative themes?") seemed unlikely to produce a reliable answer, since the negativity bias operates at a subconscious level and judges (like the rest of us) would not likely be aware of its influence on our thinking.

I therefore set about to design a controlled experiment designed to measure how judges reacted to different themes, some positive and some negative, and then see whether there was any measurable difference between negative and positive themes. The test methodology would be to write different versions of a summary judgment brief on a hypothetical case, and then ask a large number of judges (primarily trial judges) to react to the brief at various points while reading the brief.<sup>21</sup>

That, of course, was easier said than done. One of the first problems I encountered in designing the test was to determine what, exactly, I meant by "going negative." There are many different ways of doing so, and if I tried to test all of them, I would need such a large number of participants that it would be impossible to get a scientifically valid pool of participants. I therefore decided to test two different forms of negative themes: (a) attacks on the virtue of the opposing side (i.e., arguments that the opposing side is not worthy of the court's support), and (b) attacks on the policies advanced by the opponent (i.e., that ruling in favor of the opposing side would be against public policy).

Negative attacks on an opponent's characteristics and negative attacks on the policies advanced by an opponent are what I call "substantively negative" attacks. A different way to go negative would be "stylistically negative" attacks. A stylistically negative attack would take the form of ad hominem attacks, hyperbole and exaggeration, ridicule, hostile tone, and similar tactics. Those stylistic choices could be directed either at the opposing client or at the policy arguments advanced by the opponent. I chose not to test stylistically negative attacks because I feared that judges would easily spot that tactic and reject it.<sup>22</sup> When judges admonish advocates to not go negative, it is likely that those are the tactics they most dislike, and will most easily spot and reject. I was more interested in the

<sup>21</sup> The project was approved by the University of Wyoming Institutional Review Board as exempt "because the research involves minimal risk." Email from Collette Kuhfuss on behalf of the Institutional Review Board, April 20, 2015 (on file with author).

<sup>22</sup> Cf. LANCE LONG & WILLIAM CHRISTENSEN, *Clearly, Using Intensifiers Is Very Bad, Or Is It?*, 45 IDAHO L. REV. 171, 175–76 (2008) (suggesting that judges tend to dismiss, and evaluate negatively hyperbole and exaggeration when asked to rate the persuasiveness of a sentence with and without the exaggeration).

more-subtle, substantive ways in which advocates might choose to go negative.

### A. Test Hypothesis

Based on the psychological research discussed in Part II above, I began the project with two test hypotheses:

1. Since the human brain is hard-wired to attend to, process, and remember negative information, a negative theme is more likely to (a) be remembered, and (b) influence the court's thinking.

2. This effect is likely to be more pronounced if the negativity relates to the personal characteristics of the litigants (the first test condition) rather than abstract policy considerations (the second test condition).

These hypotheses were developed based on my understanding of how the negativity bias affects most of us in our daily lives.<sup>23</sup> The point of the test, therefore, was to determine whether judges react to negative stimuli in briefs the way that most of us react to negative stimuli in other areas of our lives.

### B. Test Case

For the test case, I wanted to select an issue that was not overtly political but that might trigger different responses depending on the worldview of the responding judges. I designed some baseline questions to try to determine whether a responding judge had an identifiable pre-existing worldview, so that I would then be able to determine whether that worldview had any significant impact on the decision the judge favored by the end of the test.

I chose to invent a problem involving a small business involved in a dispute with the federal government. The spectrum of worldviews that might be implicated by such an issue might include, on one side, judges who are inclined to support individual rights and freedoms, and on the other side judges who are inclined to support government regulations designed to protect the public.<sup>24</sup> I also decided to set the problem in a fictional jurisdiction so as to reassure potential judicial participants that I was not attempting to obtain an advisory ruling on an actual pending case. However, to make the test case as realistic as possible, I chose to create a case that could be governed by actual federal laws.

<sup>23</sup> See Chestek, *supra* note 3.

<sup>24</sup> Of course, these are not mutually exclusive positions; the range of possible views on these issues is not linear. However, since my purpose in choosing a somewhat political issue was to attempt to measure whether the judges' ultimate responses were motivated by pre-existing views as opposed to reactions to the test variable, it seemed to me that this rough simplification might give some useful evidence to determine what I was actually measuring.

The case I invented involved a hypothetical small business, Rochford Heating, Inc., which manufactured specialty furnaces for mobile homes. One of the units that it sold to a mobile-home manufacturer later malfunctioned, causing a catastrophic fire, which destroyed the home and caused severe injuries to an occupant of the home. An investigation by the United States Department of Housing and Urban Development (HUD) later determined that the furnace manufactured by Rochford had not complied with numerous private manufacturing standards that had been adopted by reference in HUD’s standards for the manufacture of mobile homes.<sup>25</sup> The HUD regulations incorporate by reference 214 separate standards published by 35 different entities, including many published by the American National Standards Institute (ANSI), a private, 501(c)(3) organization that creates and promulgates thousands of manufacturing standards commonly used in many industries.

The problem arose because most of the standards incorporated into the HUD regulations, including all of those published by ANSI, are not public documents; they are available only by purchasing a license from the organization that promulgated them. The cost of purchasing access to every standard incorporated by HUD into the regulations governing manufactured homes would have exceeded \$25,000.<sup>26</sup> The cost of purchasing just those standards that turned out to be relevant to the defect that caused the fire would have been over \$2,400; however, Rochford argued that it would need to purchase all of the standards, at the higher \$25,000 cost, just to determine which ones might be applicable to the heating system. Due to the high cost, Rochford chose not to purchase the standards.

HUD determined that the fire was caused by Rochford’s failure to conform to several of the ANSI standards incorporated by reference in the HUD regulations. HUD sought to impose a fine of \$250,000 against the manufacturer of the mobile home. That manufacturer in turn sought indemnification for that amount from Rochford. Rochford then sued HUD for a declaratory judgment holding that the regulations were unenforceable because requiring Rochford to purchase access to those regulations from a private entity violated the Administrative Procedure Act, which requires incorporated standards to be “reasonably available” to the public.<sup>27</sup>

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<sup>25</sup> 24 C.F.R. § 3280.4 (2016).

<sup>26</sup> While the number of applicable private standards incorporated into the HUD regulation is accurate, the cost of acquiring access to them was an estimate only. I believe, however, the estimate is reasonably close to what the actual cost would be.

<sup>27</sup> 5 U.S.C. § 552(a)(1). I wish to thank my colleague Emily Bremer, Assistant Professor of Law, University of Wyoming, for suggesting this legal issue to me. See Emily Bremer, *On the Cost of Private Standards in Public Law*, 63 U. KAN. L. REV. 279 (2015).



### C. Test Design

Having chosen the legal dispute, I needed to design a test that isolated the theme as the test variable. I also needed to design a test that could be completed by judges in a relatively short span of time, so as to encourage participation.<sup>28</sup> The test vehicle consisted of four main sections:

1. A series of questions gathering basic demographic information about the respondent, in order to get some data to evaluate whether the final sample is representative of the likely universe of respondents.
2. A series of questions to gather data to evaluate whether the respondents had any pre-existing bias that might influence their responses to the substantive part of the test.
3. The substantive test, in which eight different themes were presented and the responses of the participants are measured.
4. A concluding section in which the respondent was asked to decide which way he or she was leaning based on the information provided to date, and why.

I will describe each of these sections in more detail and discuss the results in Part IV, below.

### D. Recruitment of Test Participants

Once the test was designed, I set about recruiting judges to participate in the study. This proved more difficult than I had anticipated; who knew that judges don't like taking tests any more than the rest of us do?

I set out principally to recruit trial-level judges to the study. This included either state or federal trial courts of general jurisdiction, small-claims courts, administrative-law tribunals, military courts, and tribal courts. Since several of the methods I used for inviting participants reached appellate-court judges as well, five appellate judges responded.<sup>29</sup>

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<sup>28</sup> The complete test, including all nine different Preliminary Statements, is attached to this article as Appendix A.

<sup>29</sup> I decided to include those five responses in the universe of data because many appellate judges were once trial judges. Moreover, I could not think of a principled reason why the negativity bias might impact appellate judges more or less significantly than trial judges. Nothing in the data suggests that the five appellate judges who responded had a widely varying view of the likely outcome of case, either. Of the 93 trial judges of general jurisdiction who responded, 52.7% leaned toward Rochford by the end of the test, while 32.3% leaned toward defendant and 12.9% were undecided. Of the five appellate judges in the sample, 80% (four respondents) leaned toward plaintiff and 20% (one respondent) leaned toward defendant; none was undecided. Kenneth D. Chestek, *Fear and Loathing in Persuasive Writing: An Empirical Study of the Effects of the Negativity Bias (Survey Data)* (on file with author).

Given the low *n* for the appellate-judge category (only five responses), no solid conclusions can be drawn about whether appellate judges view the case differently than trial judges; but there is also no red flag in those results, suggesting there may be a significant difference in whether the negativity bias affects one group more than the other. (Note, however, that on another metric, there may be a difference between trial and appellate judges. See *infra* discussion at notes 97–98 (regarding whether the respondent viewed the test case as more about the facts or about the law).)

From the outset, I wanted judges to participate in the study on paper, primarily because of the recent scholarship that suggests readers engage with printed material in a different way than do people who only read materials on a computer screen.<sup>30</sup> I wanted to be sure that the study would be taken seriously. For this reason, my first approach to recruiting judges to participate was through the National Judicial College (NJC) in Reno, Nevada, which graciously agreed to offer judges attending many of its classes the opportunity to participate in the study. A representative of the NJC read a standard introduction and invitation at the opening of some of its courses, and asked for a show of hands for volunteers to participate.<sup>31</sup> Volunteers were given a test packet (randomly given out so that the participants had a mixture of different conditions to respond to), and were asked to take the test on their own and return the test (with no identifying information included) to a central location, to later be returned to me.

I also solicited volunteers by email through several organizations for judges, including several organizations devoted to continuing education for judges.<sup>32</sup> Recipients of such email solicitations were instructed to contact my research assistant by email, and she would send them a randomly selected test packet identical to the ones distributed on site at the NJC. Participants then completed the test at their leisure and returned it to my research assistant by ordinary mail. By doing this, participants solicited by email completed the test under virtually identical circumstances (hard copy in their spare time) as did the NJC participants.<sup>33</sup>

All of these methods resulted in 163 judges from around the country participating in the study.

<sup>30</sup> See generally ROBERT DUBOSE, *LEGAL WRITING FOR THE REWIRED BRAIN: PERSUADING READERS IN A PAPERLESS WORLD* (2010); Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 *LEG. COMM. & RHETORIC: J. ALWD* 1, 12–13 (2015).

<sup>31</sup> The introduction and invitation to participate did not identify “negativity bias” as the test variable. Participants were told only that they would be participating in “a test of the judicial reasoning process.”

<sup>32</sup> Among the organizations that solicited participants over their listservs and email were the American Bar Association Judicial Division, the Michigan Judicial Institute, the National Courts and Sciences Institute, and the Center for Judicial Studies at Duke University. Several legal writing colleagues around the country also graciously sent invitations to judges at various levels that they had contact with, including Prof. Lance Long (Stetson University) and Prof. Brian Sites (Barry University).

<sup>33</sup> There was no measurable difference in the results based on whether the respondents took the test at the National Judicial Center or by email. This chart compares the final outcome (whom the respondent tended to favor) as reported by the NJC participants versus the email participants:

	NJC	Email
<i>n</i> participants	93	70
Plf wins	52.7%	54.3%
Dft wins	33.3%	31.4%
Neither	14.0%	14.3%

The minor variation in the outcomes was judged to be inconsequential.

## IV. Results

What did I find? This section reports the results gathered from the 163 respondents.

### A. Demographics of the Sample

To get a sense of how well the respondent pool represented the universe of judges, the first section of the test vehicle asked each respondent to identify (a) which of five geographic regions their court sat in, (b) whether the participant was an active judge or retired, (c) how long (within a range of five years) the participant had been on the bench, (d) what level or type of court the participant sat on, and (e) the participant's gender.

Table A reports the demographics revealed by the first section of the test instrument.

**Table A**

<b>Region</b>	East	21	13.2%
	Southeast	14	8.8%
	Midwest	65	40.9%
	Mountain West/Southwest	23	14.5%
	West	36	22.6%
<b>Years Service on Bench</b>	0–4 years	58	36.0%
	5–9 years	37	23.0%
	10–14 years	24	14.9%
	15–19 years	20	12.3%
	20–24 years	7	4.3%
	More Than 25 years	15	9.3%
<b>Level of court</b>	Trial court	93	58.5%
	Appellate Court	5	3.1%
	Military	1	0.6%
	Administrative	19	11.9%
	Small claims	35	22.0%
	Tribal Court	6	3.8%
<b>Gender</b>	Male	95	59.4%
	Female	63	40.6%

Unfortunately, I do not have complete or accurate numbers as to the number of judges in each category in the universe of actual judges, so it is impossible to estimate whether the sample is representative of the whole universe. However, several possible sampling errors do appear in the

charts above. For example, it appears that the Midwest and West regions may be overrepresented in the sample, probably due to the fact that the National Judicial College is located in the West region, and Michigan is in the Midwest region (the Michigan Judicial Institute solicitation of its members resulted in a large influx of responses). Likewise, the sample appears to be skewed towards relatively new judges; 36.0% of respondents had 0–4 years of judicial experience, and another 23.0% had 5–9 years of experience. This, too, may be a result of the fact that newer judges may be more likely to avail themselves of training at the National Judicial College.

It is impossible, however, to determine whether these apparent sampling errors introduced any bias into the results. It is assumed that any such bias would be minimal, since there is no obvious link between those characteristics (location and years of experience) and the negativity bias.

## B. Possible Pre-existing Bias Towards the Subject Matter

The second section of the test instrument included a series of questions that attempted to determine whether the participant held some pre-existing bias that might interfere with his or her evaluation of the test case.<sup>34</sup> From the outset I wondered whether my test vehicle would measure the participant’s actual reaction to the test variable, or whether the participant would be influenced by a pre-existing set of beliefs or dispositions. But I could not simply ask the participant whether he or she was “liberal” or “conservative.” For one thing, those labels are too broad and generally meaningless. For another, I anticipated that participants would resist answering the question, or even be offended that I asked the question and then decline to participate in the study. So I designed a series of questions to try to get at this element more indirectly.

I chose four recent United States Supreme Court decisions that had been decided by sharply divided courts. All four cases<sup>35</sup> involved disputes between a private individual or company and the government. Three were civil cases; one was a criminal case. I then provided a synopsis of both the

<sup>34</sup> In essence, I was attempting to determine whether “motivated reasoning” influenced a participant’s thinking in completing the test. “Motivated reasoning refers to the unconscious tendency of individuals to process information in a manner that suits some end or goal extrinsic to the formation of accurate beliefs.” Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19 (2011), citing Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990).

<sup>35</sup> The four cases I chose were *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (deciding whether a closely held corporation could ignore, on religious grounds, a government mandate to provide certain forms of birth control through the company’s health-insurance plan for its employees), *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011) (deciding whether a corporation in the United Kingdom was subject to jurisdiction of a court in New Jersey in a products-liability case), *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (deciding whether an alert from a drug-sniffing dog on the porch of a home constituted a “search” under the Fourth Amendment), and *Kelo v. City of New London*, 545 U.S. 469 (2005) (deciding whether the power of eminent domain can be used to purchase blighted property from one private party in order to transfer that property to another private party).

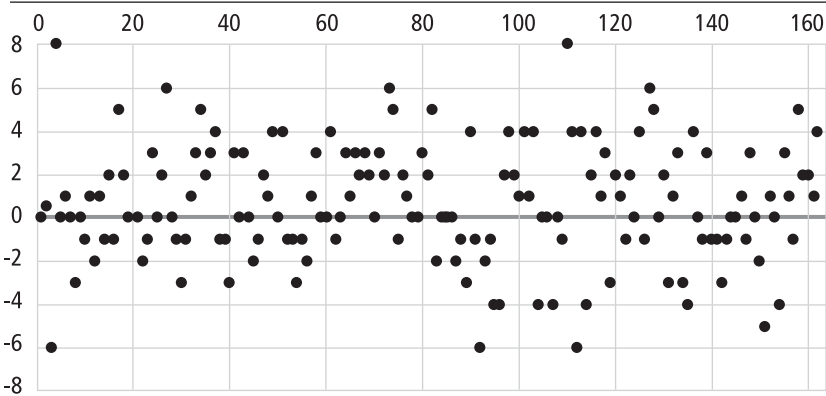
majority and dissenting opinions, taken from the official court reporter’s syllabus of the case, and asked participants if they tended to agree with either the majority position or the dissent, on a five-point scale (1 for strongly agree with the majority and 5 for strongly agree with the dissent).<sup>36</sup> By doing so, I hoped to be able to score each participant on a scale of “tends to favor the individual or private interest” to “tends to favor the government.”<sup>37</sup>

To measure this, I compiled a “worldview score” for each participant in the study. For each of the four test cases presented,<sup>38</sup> each judge was asked to rank his or her agreement with the majority or dissent. I assigned point values to each judge’s response as follows:

- Strongly in favor of government side .....+2
- Somewhat in favor of government side .....+1
- Neutral .....0
- Somewhat in favor of individual side .....-1
- Strongly in favor of individual side .....-2

I then added the respondent’s score for each of the four cases to get a “worldview score.” The maximum of +8 points represented a respondent who strongly sided with the government’s position in all four cases, while a score of -8 represented a respondent who strongly sided with the individual’s or private business’s position in all four cases. I then did a scatter plot to visualize the distribution of worldview scores, as shown in Table B:

**Table B: Government Business/Individual Preference**



<sup>36</sup> For all four cases, respondents were also given a sixth choice, “I prefer not to express an opinion.” Out of 652 total responses to those questions, only 6 (less than .1%) stated that they preferred not to answer. A total of 36, or 5.5%, responded that they were neutral on any of the four cases.

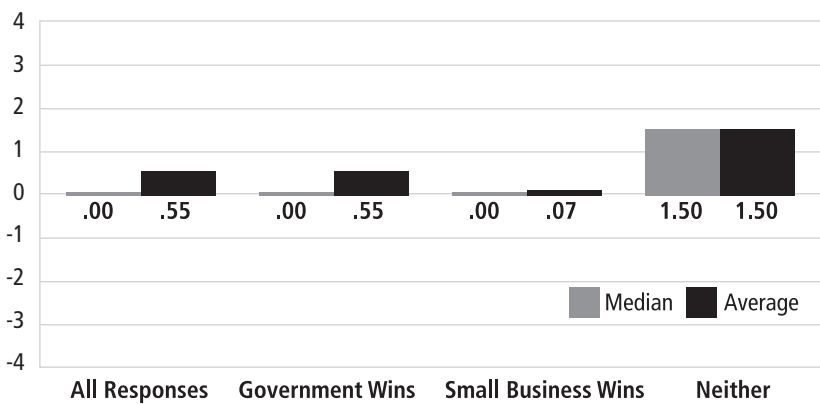
<sup>37</sup> In a sense, this was an effort to eliminate “authority bias” as a possible reason for a judge’s leaning one way or the other. “Authority bias” refers to the tendency to attribute greater accuracy to the opinion of an authority figure (unrelated to its content) and be more influenced by that opinion. See, e.g., Stanley Milgram, *Behavioral Study of Obedience*, THE J. OF ABNORMAL & SOC. PSYCHOLOGY 371 (1963).

<sup>38</sup> See *supra* discussion at note 35.

Each dot on this chart represents a single judge’s worldview score. The plot reveals what I expected: a pretty diverse set of worldviews. Several judges scored +8 on the scale, a few others -6, but most of the judges fell somewhere in the middle.

I then isolated the judges who ultimately leaned toward Rochford from the judges who ultimately leaned toward HUD; I also separately analyzed the small group of judges who ended the test undecided as to whom they leaned toward. For each group I aggregated the worldview scores by median score and mean score. Table C reports those results:

**Table C: Effect of Prior World View**



This chart shows that, for all 163 responses, the median worldview score was zero, and the mean 0.55 (a very slight preference for the government’s position, which is consistent with the preference expressed by the control group for the government). Among those who ultimately leaned toward the government,<sup>39</sup> the median worldview score was again zero, and the mean 0.55 (again, a very slight preference for the government). Among those who found for the small business,<sup>40</sup> the median score was zero and the mean was an insignificant 0.07. Interestingly, the only group with a significant worldview score favoring either side was the group that ultimately could not decide which way it leaned,<sup>41</sup> for that group both the mean and median worldview score was 1.5 in favor of the government.

My conclusion from this was that any pre-existing worldview was not a significant factor in determining which way a judge was likely to lean by the end of the test. The fact that the group with the strongest worldviews

<sup>39</sup> This category represented 47 respondents.

<sup>40</sup> This category represented 67 respondents.

<sup>41</sup> This group represents 21 respondents.

was the group that could not determine which way it leaned was a strong indicator that the respondents, as a whole, were doing a pretty good job of setting aside their personal viewpoints in deciding cases.<sup>42</sup>

### C. The Substantive Test

The substance of the test, of course, was designed to test judges' reactions to different themes (positive or negative). To accomplish this, I presented the participants with excerpts of a summary-judgment brief. The excerpts each began with one of nine different Preliminary Statements, eight of which expressed a different theme.<sup>43</sup> I then asked a few questions about the judge's impressions after reading just the Preliminary Statement; respondents were instructed not to read ahead, but to answer every question before moving on. Every participant then read the same Stipulation of Facts, providing more detail about the case.<sup>44</sup> In the hypothetical dispute between Rochford and HUD, both sides moved for summary judgment, so having the parties jointly draft such a stipulation was realistic. The stipulation included all of the facts, stated in a neutral tone, that both sides would choose from in presenting their arguments, and that had been referred to in the nine different Preliminary Statements. Participants were asked to react to the case again after reading the stipulation of facts (to see if they had changed their views), and then reported which party they were inclined to favor after reading just those two portions of the brief.

The nine different Preliminary Statements included four written by Rochford, four written by HUD, and a single control version that simply reported the procedural posture of the case in a neutral manner and which could have been written by either side.<sup>45</sup> Of the four versions written by a

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<sup>42</sup> This finding is consistent with the findings of an empirical study of 253 sitting judges recently conducted by a group of professors, psychologists, and judges. See Dan M. Kahan *et al.*, "Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment, 164 U. PA. L. REV. 349 (2016) [hereinafter "Kahan II"]. That study involved a group of 253 sitting judges, 800 members of the general public, 217 practicing lawyers and 284 law students. The study first used the Cultural Cognition Worldview Scale to measure respondents' pre-existing beliefs on two dimensions: hierarchy-egalitarianism and individual-communitarianism. It then presented two different statutory-interpretation problems to all participants and asked them how they would rule in those cases if they were judges. The study concluded that judges and lawyers tended to converge on their resolutions of the two cases regardless of their pre-existing ideological leanings, while members of the public and (to a lesser extent) law students tended to reach divergent resolutions aligned with their pre-existing ideological leanings.

The Wistrich *et al.* studies cited in note 18, *supra*, reach a similar conclusion. While those studies provided strong support for the conclusion that pathos matters a great deal (in that judges reacted more favorably to sympathetic parties and more harshly to unsympathetic parties), the authors could not detect any significant difference between judges based on party affiliation or political ideology. Wistrich *et al.*, *supra* note 18, at 899.

<sup>43</sup> All nine of the Preliminary Statements are attached to this article as Appendix A.

<sup>44</sup> The standard Stipulation, read by all participants, is attached to this article as Appendix B.

<sup>45</sup> The control condition was inserted to measure test validity. Although I tried to create a hypothetical problem with good policy and factual arguments on both sides, I needed to test whether the problem was inherently biased toward one side or the other. If either Rochford or HUD generated more support in a neutral condition, I would still be able to measure the

litigant, two (each) presented positive themes (personal characteristics and policy considerations) and two presented negative themes (again, personal characteristics and policy considerations). The nine conditions were as follows:

Condition	Author	Theme
1	Rochford	Negative (policy)
2	HUD	Negative (policy)
3	Rochford	Negative (characteristics)
4	HUD	Negative (characteristics)
5	—	Neutral (procedural posture)
6	Rochford	Positive (policy)
7	HUD	Positive (policy)
8	Rochford Positive	(characteristics)
9	HUD	Positive (characteristics)

Of course, identifying these nine conditions was easy. Writing Preliminary Statements that focused on only the stated test condition proved to be much more difficult. In a real brief, authors are not limited to choosing a single theme, but in order to isolate the variable of theme I had to write Preliminary Statements that were limited in scope to the chosen theme. But each Preliminary Statement focused on the same rule of law: whether the HUD regulation complied with the Due Process Clause of the Fourteenth Amendment (i.e., whether HUD satisfied the requirement that standards incorporated by reference were “reasonably available” to the parties bound by them).<sup>46</sup>

The final section of the test instrument asked two broad, open-ended questions, inviting a text response. Participants were given a brief synopsis of the applicable provision of the Administrative Procedure Act, along with a brief description of a case holding that when a state regulation incorporates by reference copyrighted materials as a standard, that material does not lose copyright protection.<sup>47</sup> Participants were then

effect of the eight valanced conditions by measuring how much more, or less, support those conditions generated as compared to the control condition.

<sup>46</sup> The Administrative Procedure Act requires agencies to publish in the Federal Register “substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and . . . each amendment, revision, or repeal of the foregoing.” 5 U.S.C. § 552(a)(1)(D)–(E) (2012). Further, “[f]or the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.” *Id.* § 552(a)(1).

<sup>47</sup> In *CCH Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994), the plaintiff claimed that its inclusion of data from another publisher about used-car values in its compendium of used-car values (the “Red Book”) did not violate defendant’s copyright, in part because several states had designated Red Book values as an alternative standard for valuing cars in insurance claims. The court held,



asked to respond to two questions, without looking back at the sections of the brief they had read: (a) “Please describe what this case is about,” and (b) “Based only on what you have read so far, in whose favor are you currently inclined to rule, and why?” The first question was designed as a test of memory, since one of the ways the negativity bias manifests itself is that the negative information is remembered longer. The second question was designed to test whether the participants who had read a negative theme would express that theme in responding to the “why” part of the question.

The questions were open-ended for another reason as well: I wanted to see whether the stated reason was (a) law-based or (b) fact-based. That is, would respondents report that they were inclined to go one way or the other because the law required that result, or because the facts of the case suggested that one party or the other should win? I hoped to see whether the respondents who responded to conditions involving the personal characteristics of the litigants were more likely to cite the facts in their reasoning than those who responded to conditions involving policy-based themes (which might tend to lead them to citing the law in their reasoning).

## D. Results

So what did the substantive results reveal?

### 1. Overall Results: Was Bad Stronger Than Good?

Table D (following page) compiles the results from all responses.

In this table, “All” reports the final result (“who are you inclined to rule in favor of at this point?”) for all 163 valid responses. The grouping marked “Neutral” reports the results only from those who read Condition 5 (the neutral control version). The grouping marked “All Small Business” reports the results from those who read Conditions 1, 3, 6, and 8 (written

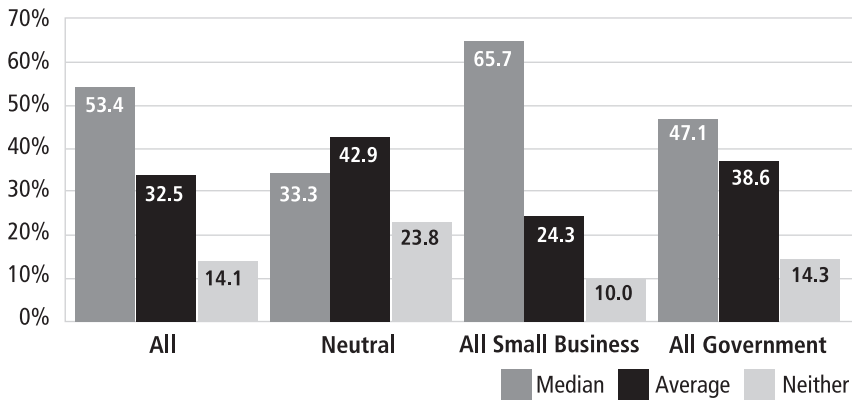
We disagree also with the district court’s ruling sustaining CCC’s affirmative defense that the Red Book has fallen into the public domain. The district court reasoned that, because the insurance statutes or regulations of several states establish Red Book values as an alternative standard, i.e., by requiring that insurance payments for total losses be at least equal either to Red Book value or to an average of Red Book and Bluebook values (unless another approved valuation method is employed), the Red Book has passed into the public domain. The argument is that the public must have free access to the content of the laws that govern it; if a copyrighted work is incorporated into the laws, the public need for access to the content of the laws requires the elimination of the copyright protection. . . .

We are not prepared to hold that a state’s reference to a copyrighted work as a legal standard for valuation results in loss of the copyright. While there are indeed policy considerations that support CCC’s argument, they are opposed by countervailing considerations. For example, a rule that the adoption of such a reference by a state legislature or administrative body deprived the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution.

*Id.* at 73–74 (footnote omitted).



**Table D: All Responses**



by the attorneys for Rochford), while the grouping marked “All Government” reports the results from those who read Conditions 2, 4, 7, and 9 (written by the attorneys for HUD).

The Neutral results are pretty much what one would expect: a slight leaning toward the government, but with significant responses in favor of Rochford and a significant response of “Neither.” Since that condition simply reported the procedural posture of the case with no advocacy, it is not surprising that the results are fairly scattered.

The “All Small Business” columns are likewise what one might have predicted. A clear majority of those judges who read Preliminary Statements written to favor Rochford were leaning toward Rochford even after reading the neutral stipulation of facts.

The “All Government” columns are surprising. As a whole, the judges who read Preliminary Statements written to favor HUD had a slight preference for Rochford after reading the stipulation of facts. That result would not have been predicted by the neutral control group (which favored the government),<sup>48</sup> nor does it make intuitive sense. Why would advocacy on behalf of the government result in turning judges toward the other side? To answer that question, let us look separately at the four different conditions that are accumulated in the last two groupings of Table B.

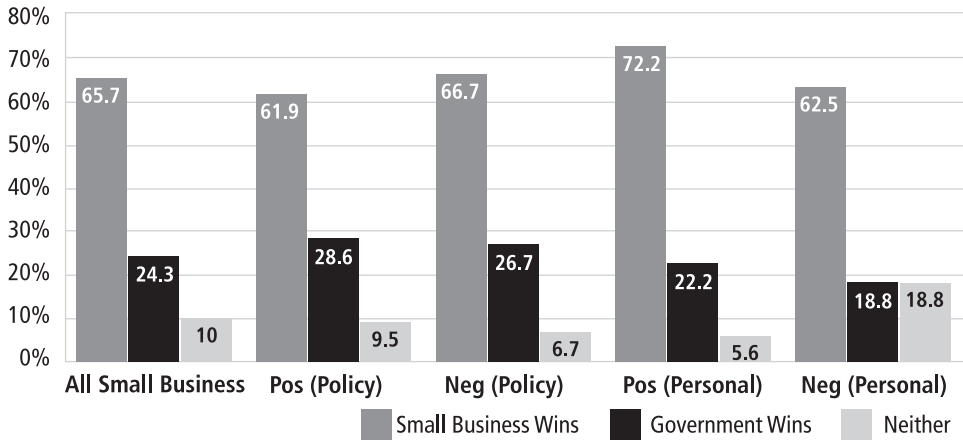
**2. Specific Results Broken Down by Test Condition**

Table E breaks out all of the responses from judges who read one of the four Preliminary Statements written on behalf of Rochford.

There are no dramatic differences between any of these conditions. When Rochford argued that HUD’s position would be bad public policy,

<sup>48</sup> See *infra* Table G.

**Table E: All Small Business Responses**

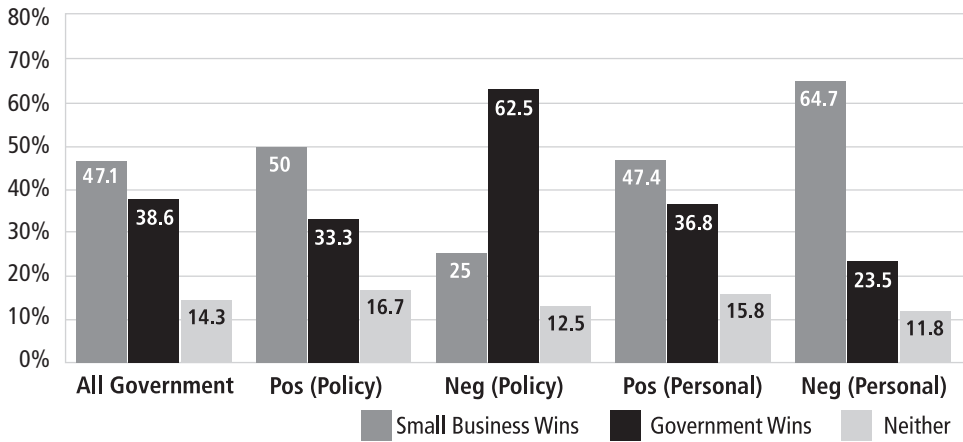


Rochford won 66.7% of the time, compared to just 61.9% of the time when it argued that a ruling in its favor would advance good public policy. The results were slightly different for the personal characteristics themes: Rochford won 72.2% of the time when advancing a positive theme (i.e., that as a small business, it should not have to bear the high cost of gaining access to the standards), but only won 62.5% of the time when it argued a negative personal characteristics theme (i.e., that HUD did not deserve to win because it was lazy in simply adopting regulations by reference). Thus, it appears that negative policy themes were a slightly more effective strategy for the small business than were negative attacks on the personal characteristics of the government; conversely, it was slightly more effective for the small business to show its personal characteristics in a positive light than for it to show how its arguments resulted in good policy outcomes.

The results were much different for the government side of the case, as shown in Table F (following page).

When the government advanced a negative policy (i.e., that allowing a small business to escape the reach of HUD’s regulations would be bad policy), it won 62.5% of the time. The positive policy argument (i.e., that allowing HUD to incorporate private standards by reference was good policy because private organizations are better equipped to write meaningful regulations) only worked 33.3% of the time.

On the personal characteristics side, going negative was always counterproductive for the government. When it argued that Rochford deserved to lose because it intentionally chose to remain ignorant of what the incorporated regulations required, the government won only 23.5% of the time. The positive personal characteristic argument (i.e., that HUD deserved to

**Table F: All Government Responses**

win because it did a good job in selecting reliable organizations to incorporate standards from) worked only slightly better: HUD won 36.8% of the time, but still lost to the small business 47.4% of the time.

To sum up, the negative policy arguments worked better for both Rochford and HUD. A negative theme aimed at the personal characteristics of the other side worked well for Rochford, but backfired for HUD.

### E. Investigating the Thought Processes

Because the test instruments asked for reactions after respondents read just the Preliminary Statement, and again after respondents read the Stipulation of Facts, it is possible to track overall changes in attitude as respondents moved through the exercise. It is also possible to compare the attitudes developed during the reading process to the final outcome.

However, a caution: after the Preliminary Statement and again after the Stipulation, respondents were asked two questions: (a) "What opinion do you have of Rochford Heating at this point?" and (b) "What opinion do you have of the Department of Housing and Urban Development at this point?" Respondents were requested to rate the strength of their responses on a nine-point scale, from -4 (very negative opinion) to +4 (very positive opinion). These questions were chosen deliberately to get a sense of the pathos evoked first by the Preliminary Statement, and then by the Stipulation of Facts. At those two points in the test, all the respondents knew about the case was the story of the dispute to date; no legal theories had been developed. My purpose was to determine the extent to which different types of themes evoked pathos favoring the party writing the brief.

**1. Did the Reader’s Response Shift during the Reading Process?**

Of the 163 responses received, fifteen respondents did not fully report their opinion of one or more of the parties at the two stages where that information was requested. Accordingly, it was not possible to determine whether those respondents had a more or less favorable opinion of the parties, so those responses were therefore excluded from this analysis.

The remaining 148 responses were then evaluated to determine whether the respondent had a more or less favorable opinion of one party or the other, simply by determining whether one party scored higher or lower than the other. Thus, for example, if a respondent had a negative opinion of both parties, but the negative opinion of the Plaintiff (Rochford) was stronger than for the Defendant (HUD), that respondent was reported as having a preference for the HUD. It was also possible (and happened fairly frequently) that a respondent had equally positive or negative opinions of both parties; those respondents were reported as neutral.

Table G reports the results for all nine conditions:

The first grouping reports for which party the respondents who read each condition had a more favorable opinion after reading just the

**Table G**

Condition	n Valid Responses	Favors Rochford	Favors HUD	Neutral	Favors Rochford	Favors HUD	Neutral	Lean Rochford	Lean HUD	Neutral
5 (Neutral)	20	30.0%	50.0%	20.0%	45.0%	35.0%	20.0%	35.0%	40.0%	25.0%
1 (Rochford Neg Policy)	14	71.4%	0.0%	28.6%	71.4%	14.3%	14.3%	71.4%	21.4%	7.1%
3 (Rochford Neg Characteristics)	13	76.9%	0.0%	23.1%	61.5%	30.8%	7.7%	69.2%	15.4%	15.4%
6 (Rochford Pos Policy)	20	45.0%	20.0%	35.0%	60.0%	30.0%	10.0%	60.0%	30.0%	10.0%
8 (Rochford Pos Characteristics)	17	70.6%	17.6%	11.8%	82.4%	5.9%	11.8%	70.6%	23.5%	5.9%
<b>All Rochford</b>	<b>64</b>	<b>66.0%</b>	<b>9.4%</b>	<b>24.6%</b>	<b>68.8%</b>	<b>20.2%</b>	<b>10.9%</b>	<b>67.8%</b>	<b>22.6%</b>	<b>9.6%</b>
2 (HUD Neg Policy)	16	0.0%	75.0%	25.0%	31.3%	62.5%	6.3%	25.0%	62.5%	12.5%
4 (HUD Neg Characteristics)	17	0.0%	94.1%	5.9%	41.2%	41.2%	17.6%	64.7%	23.5%	11.8%
7 (HUD Pos Policy)	14	28.6%	50.0%	21.4%	57.1%	35.7%	7.1%	57.1%	42.9%	0.0%
9 (HUD Pos Characteristics)	17	17.6%	64.7%	17.6%	52.9%	35.3%	11.8%	47.1%	41.2%	11.8%
<b>All HUD</b>	<b>64</b>	<b>11.6%</b>	<b>71.0%</b>	<b>17.5%</b>	<b>45.6%</b>	<b>43.7%</b>	<b>10.7%</b>	<b>48.5%</b>	<b>42.5%</b>	<b>9.0%</b>

Preliminary Statement. Not surprisingly, respondents who read a Preliminary Statement favoring Rochford had an overall more favorable opinion of Rochford at that point (66.0% favorable to the Rochford, 9.4% favorable to HUD, and 24.6% neutral). Those who read Preliminary Statements favorable to HUD had an even more dramatic preference for HUD (11.6% favorable to Rochford, 71.0% favorable to HUD, and 17.5% neutral). Interestingly, the negative themes presented by both Rochford and HUD had more-powerful effects in favor of the party advocating that theme than did the positive themes.<sup>49</sup> This might be attributed to the relative lack of information the judge has at this point (just a few paragraphs), requiring the judge to engage his or her System 1 (fast) thinking, where negativity likely has more impact.<sup>50</sup>

The next grouping reports of which party the respondents who read each condition had a more favorable opinion after reading the same (neutral) Stipulation of Facts. Something interesting is revealed there. Overall, those who read Preliminary Statements favorable to Rochford had a slightly more favorable opinion of Rochford after reading the Stipulation (66.0% before and 68.8% after), while those who read the Preliminary Statements favorable to HUD tended to downplay their previous preference for HUD after reading the Stipulation (71.0% before and only 43.7% after).<sup>51</sup>

The final grouping in Table G compiles the respondents' answers to the final question of the instrument: "Based only on what you have read so far, in whose favor are you currently inclined to rule, and why?" Note that this asks a different question than the previous two, which asked only for the respondents' "opinion of the parties" at various stages in the reading process. Just before answering the "in whose favor are you currently inclined to rule" question, the respondents were given a synopsis of the applicable law, specifically the relevant text of the Administrative

<sup>49</sup> For Rochford, the negative themes scored 71.4% and 76.9% in favor of Rochford, compared to 45.0% and 70.6% for the positive themes. For HUD, the negative themes scored 75.0% and 94.1% in favor of HUD, compared to 50.0% and 64.7% for the positive themes.

<sup>50</sup> See *infra* Part V(A).


<sup>51</sup> I'm not sure what to make of this result. One hypothesis was that once the judges read the Stipulation, they may have concluded that the stipulated facts did not support the claims being made by HUD in the Preliminary Statement and therefore reacted negatively to HUD. I tested that hypothesis by looking at the judges' reactions to the authors of the brief at various stages of the test. In addition to asking the judges which way they were leaning after (a) reading the Preliminary Statement and (b) reading the Stipulation, I also asked the judges what their opinion of the brief's author was at both those stages. If the judges believed that the Stipulation did not deliver what the Preliminary Statement promised, one would expect the judges to have a negative opinion of the brief's authors. However, for all judges who read a Rochford brief, 37.3% of the respondents had a more negative opinion of the author after reading the Stipulation, while 35.4% of all judges who read a HUD brief had a more negative opinion of the author after reading the Stipulation. (This compares to 40.0% of the judges in the control group who held a more negative opinion of the author after reading the Stipulation.) Thus, there is no evidence to support the hypothesis that the participants believed that the HUD lawyers misrepresented the facts in their Preliminary Statements.

Procedure Act and a brief report of a case dealing with the question whether privately copyrighted standards lose their copyright protection when incorporated into a state standard (the case held that the standards did not lose that protection). Thus, in answering the final question, respondents were being asked to apply the law to the facts as they understood them at that moment (i.e., the facts as seen through the lens of whatever theme the different conditions presented).

My purpose in doing this analysis was to see whether the different themes led to significantly different final outcomes. The aggregate data suggests that they did. Overall, respondents who read Preliminary Statements favorable to Rochford leaned in favor of Rochford 67.8% of the time, and in favor of HUD only 22.6% of the time (9.6% did not indicate a preference). On the other hand, respondents who read Preliminary Statements favorable to HUD leaned in favor of Rochford 48.5% of the time, and in favor of HUD 42.5% of the time (9.0% did not indicate a preference). But the fact that those who responded to Preliminary Statements favoring Rochford had a stronger response in favor of the party that authored the brief, as compared to those who read a statement favoring HUD is curious. The control group showed a slight preference for HUD (35% for Rochford and 40% for HUD, with 25% uncertain). Given the slightly higher baseline support for HUD, it is curious that those who read a Preliminary Statement written by HUD showed slightly stronger support for Rochford.<sup>52</sup>

Consistent with what was reported above, the results from the HUD respondents also reveal that the negative themes had dramatically different results. When HUD argued that Rochford’s policy arguments were bad, HUD won 62.5% of the time. But when it argued that Rochford was a bad company for failing to purchase access to the regulations incorporated by HUD, HUD won only 23.5% of the time. But note the change in this view over time:

**Table H**

CONDITION	FAVORS D AFTER PS	FAVORS D AFTER STIP	D WINS 
2 (D Neg Policy)	75.0%	62.5%	62.5%
4 (D Neg Characteristics)	94.1%	41.2%	23.5%

<sup>52</sup> This could be the result of the fact that HUD, a governmental entity, begins with a presumption of correctness, but as respondents learned more about the case, the underdog effect began to shift the reader’s perceptions. Erwin Chemerinsky has argued that courts sometimes give deference to “authoritarian institutions.” Erwin Chemerinsky, *The Hazelwooding of the First Amendment: the Deference to Authority*, 11 FIRST AMEND. L. REV. 291, 296 (2013). For a discussion of how the underdog effect might overcome that initial deference, see *infra* text at notes 77–79.

When HUD presented a negative policy argument in the Preliminary Statement, 75% of respondents initially favored HUD. That support softened to 62.5% after the respondents read the stipulation, and held at 62.5% by the end of the test. But when HUD presented a negative characteristics argument in the Preliminary Statement, the initial reaction of the respondents was over 94% in favor of HUD. After learning more about the facts in the Stipulation, however, that support dropped dramatically to just over 41%, and dropped even further to 23.5% by the end of the test. This may reflect nothing more than a result of the fact that, by this point in the study, the respondent's System 2 processes, i.e., their rational processes, as opposed to their intuitive ones, have kicked in.<sup>53</sup>

## 2. Did the Reader's Response Depend More on Law or Facts?

The last two questions of the test asked open-ended questions: (1) "Please describe what this case is about." (2) "Based only on what you have read so far, in whose favor are you currently inclined to rule, and why?" The questions were intentionally open-ended, (a) to test what the reader remembered about the case by the end of the test, and (b) to allow the reader wide discretion to describe what he or she was thinking about by the end of the test.

I then read the narrative responses and scored each response as to whether it reported more facts or more law.<sup>54</sup> That is, if the reader reported mostly facts, then the reader viewed the case as "about" the story (facts) of the case. If the response discussed more law, the reader viewed the case as about the legal issue. I then grouped together all responses according to whether those who read positive or negative themes tended to report more facts or more law, as well as whether the policy or personal characteristics themes had more effect.

Table I reports the cumulative responses to the first question: What is the case about?

This chart indicates that, other than for those who in the control group, a large majority of the readers thought the case was "about" the facts. This result was remarkably consistent across all of the valanced conditions. It did not matter whether a respondent read a preliminary statement from Rochford or defendant, a negative or positive theme, or a theme about policy or personal characteristics; by the end of the test the judges believed the case was "about" the facts (i.e., who should win versus how does the law work).<sup>55</sup>

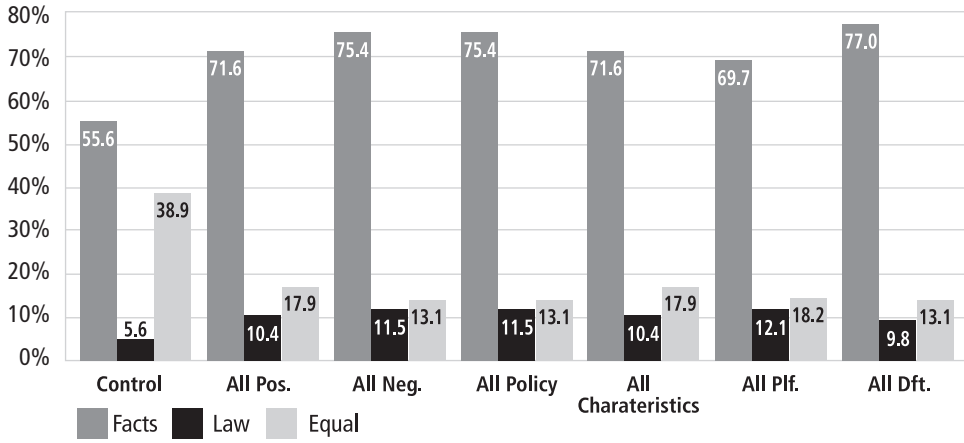
<sup>53</sup> See *infra* Part V(A) (discussing System 1 and System 2 processes).

<sup>54</sup> This was done simply by counting the number of facts reported versus the number of points of law cited.

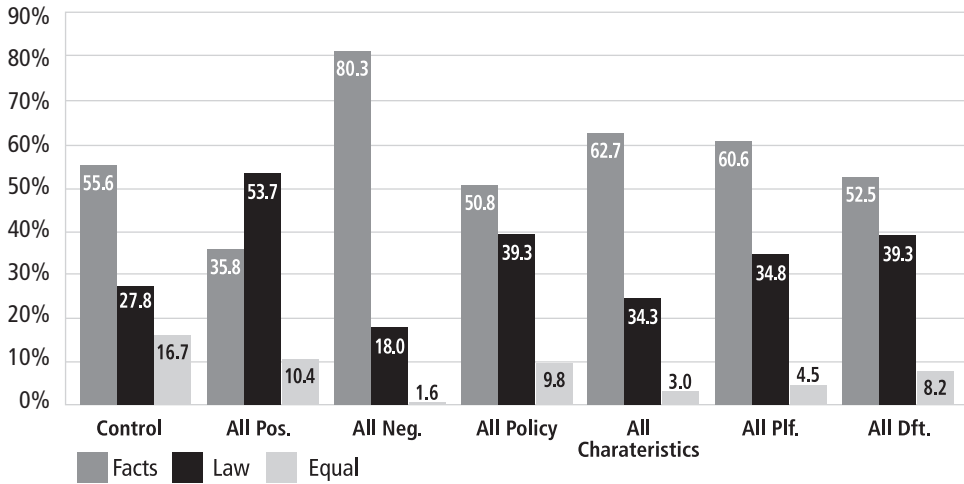
<sup>55</sup> It is unsurprising that the control group was somewhat confused about what the case was "about" since they did not learn very much about the actual controversy; rather they learned about the procedural posture of the case. More than 41 percent of the control group did not identify either "law" or "facts" in their responses to that question. Chestek, *supra* note 29.



**Table I: What Is the Case About?**



**Table J: Basis of Decision**



The responses to the second question, however, were much more revealing. Table J gathers the responses to the question, “Why are you inclined to rule in favor of one side or the other?”

My expectation in analyzing this question was that those who had read conditions based on policy themes would be more likely to report law-based reasons for leaning one way or the other, while those who read conditions based on the personal characteristics of the litigants would be more likely to report fact-based reasons for their leanings. Table J reveals

that was indeed the case, but only by a small margin.<sup>56</sup> I was surprised, however, to find that this difference was far more pronounced based on whether the respondent read a positive condition as opposed to a negative condition. That is, a significantly larger number of respondents who read briefs based on a positive theme reported law-based reasons for leaning in one direction,<sup>57</sup> while an even larger number of respondents who read briefs based on negative themes reported fact-based reasons why they were leaning in whichever direction they leaned.

## V. Analysis of the Data

So what does all of this mean?

### A. Judging is System 2 Thinking, So Pre-existing Biases Can Be Overcome

First the good news: It appears that judges are able to overcome at least some of their pre-existing biases.

While Table B above suggests that many judges do have pre-existing worldviews (in this test case, pre-existing preferences for government instead of individuals), Table C provides strong evidence that they are able to set aside those worldviews and rule based only on the law and evidence before them. This may be because judging is a “System 2” activity, while biases operate at a “System 1” level.

Nobel Laureate Daniel Kahneman has recently proposed a construct describing two ways in which the human brain processes stimuli and makes decisions. He describes “System 1” thinking as intuitive, “fast” thinking; it processes stimuli almost instantaneously and unconsciously.<sup>58</sup> “System 2” is more methodical; it monitors System 1, articulates judgments, and makes choices. It is “who we think we are”; essentially, it is our conscious, rational self.<sup>59</sup> It does not operate independently of System 1 because “it often endorses or rationalizes ideas and feelings that were

<sup>56</sup> Respondents who read one of the four policy-based themes reported that the case was about facts 50.8% of the time, while those who read one of the four characteristics-based themes reported that the case was about facts 62.7% of the time. Conversely, policy-based responders reported that the case was about the law 39.3% of the time, while characteristic-based responders reported the case was about the law 34.3% of the time.

<sup>57</sup> Respondents who read one of the four positive-themed Preliminary Statements reported that the case was about the facts 35.8% of the time, while respondents who read one of the four negative-themed statements reported that the case was about the facts 80.3% of the time. Conversely, positive-themed respondents reported the case was about the law 53.7% of the time, compared to 18.0% of the time for negative-themed responders.

<sup>58</sup> DANIEL KAHNEMAN, THINKING, FAST AND SLOW 21, 408 (2011).

<sup>59</sup> *Id.* at 21, 408, 415.

generated by System 1.”<sup>60</sup> However, System 2 can be trained to overrule System 1, which is a good thing, since System 1 often makes mistakes.<sup>61</sup>

Cognitive biases work at a subconscious level, which is quintessentially System 1 thinking. But a judge reading briefs and processing information to render a judgment is quintessentially System 2 thinking: conscious, rational, and deliberate. It is therefore not surprising (and actually pretty encouraging) to see that the judges in this study successfully overcame their prior worldviews and rendered judgments based on what they had just read.<sup>62</sup>

But note that the “worldview analysis” I did in this experiment tested for whether judges had a tendency to favor the individual or private interest or tended to favor the government.<sup>63</sup> Only one group of judges (those who remained neutral at the end of the test) showed any significant preference for the government, but they were apparently able to set that preference aside and keep an open mind about who should win. The fact that those judges were able to overcome that preference through System 2 thinking does not mean that they can also overcome a negativity bias.

It is also worth noting that most of the psychological studies reported in the literature documenting the negativity bias test lay persons engaged in nonlegal reactions, primarily involving System 1 thinking.<sup>64</sup> Thus, those studies may not be good predictors of how judges using System 2 processes might resolve legal disputes.<sup>65</sup>

<sup>60</sup> *Id.* at 415.

<sup>61</sup> *Id.*

<sup>62</sup> It is possible that judges participating in the study who were physically present at the National Judicial Center might be more inclined to engage their System 2 processes because they were in a setting where they were getting training to help with those processes. But the data does not suggest that was happening. I did record the source of the response (i.e., whether the response came from the NJC or from the email solicitations). Of the 163 responses I received, 93 were from the NJC, and the remaining 70 were from email. The worldview scores for the NJC responses closely track the worldview scores for the universe of all 163 responses, as shown in this chart:

Source	Favors Government	Favors Business	Favors Neither
All responses	0.55	0.07	1.50
NJC responses only	0.58	0.47	1.50

Nothing in this chart suggests a significant difference between how participants at the NJC approached the test as compared to the universe of all respondents. Given that the maximum value for any of these cells was 8, the difference between “.007” and “.047” in the “Favors business” column is judged to be inconsequential.

<sup>63</sup> See *supra* IV(B).

<sup>64</sup> Chestek, *supra* note 3, at 609–12.

<sup>65</sup> Lance Long, *Is There Any Science Behind the Art of Legal Writing?*, 16 WYO. L. REV. 287, 292–95 (2016) (discussing why law-specific studies are important as opposed to trying to generalize from studies from other fields). See also Kahan II, *supra* note 42, at 366 (making the point that prior studies of identity-protective cognition are not reliable predictors of whether judges are susceptible to that bias, since those studies involved members of the general public and not judges).

## B. Priming Matters

This study also establishes something that will not come as a surprise to most psychologists and many legal scholars: priming the audience has a significant impact on how the audience perceives the legal problem.<sup>66</sup> But the study may show something specific that legal writers might take advantage of: Preliminary Statements in a brief are a great way to prime your reader.

The study was designed so that the only thing that was different in the nine conditions was the Preliminary Statement. All nine conditions used the same Stipulation of Facts as well as the same summary of the law. Participants encountered the Preliminary Statement as the first substantive part of the test, yet by the end of the test those test participants who had read a Preliminary Statement written by the small business tended to view the case most favorably to the small business in all conditions.<sup>67</sup> The results for those participants who read a Preliminary Statement written by HUD were mixed, but were uniformly less favorable to the small business. In one condition, the participants strongly favored HUD.<sup>68</sup> The lesson here is that all of this persuasion occurred in the Preliminary Statement: a brief glimpse at the theme that the brief writer has chosen for the rest of the brief. Preliminary Statements are powerful. Brief writers should pay close attention to what they put in those statements.<sup>69</sup>

## C. Negative Character Themes May Not Be as Effective as Positive Character Themes, but Negative Policy Themes Do Seem to Be Effective.

The focus of this study, of course, was to determine the extent (if any) to which negative themes affect the judicial thinking process. My test hypothesis was that they would.<sup>70</sup> My conclusion after the test, like the answers to most questions, is “it depends.”

<sup>66</sup> See, e.g., Kathryn Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 OR. L. REV. 305 (2010); Michael Higdon, *Something Judicious This Way Comes . . . The Use of Foreshadowing as a Persuasive Device in Judicial Narrative*, 44 U. RICH. L. REV. 1213, 1228–33 (2010).

<sup>67</sup> Combining all four conditions that favor the small business, nearly 66% of participants leaned toward the small business. Each of the four individual conditions also favored the small business by amounts ranging from a low of 61.9% to a high of 72.2%. See *supra* Table G.

<sup>68</sup> Combining all four conditions written to favor HUD, 47.8% of respondents leaned toward the small business, while 37.7% favored HUD; 14.5% were undecided. The four individual conditions ranged widely, from 60.0% favoring HUD (the negative policy condition) to only 23.5% favoring HUD (the negative characteristics condition). See *supra* Table G.

<sup>69</sup> This study empirically proves the point that Prof. Maureen Johnson makes in her excellent article studying the introductions to various Supreme Court briefs in recent high-profile cases. Maureen Johnson, *You Had Me at Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recent Hotly Contested U.S. Supreme Court Decisions*, 49 IND. L. REV. 397, 459 (2016) (arguing that brief writers “really do have to grab the reader from the get-go”).

<sup>70</sup> See *supra* III(A).

Looking at just the four conditions where the Preliminary Statement favors the small business, it is impossible to discern any meaningful difference between the positive themes and the negative themes. As noted above, the mean for all four conditions showed 65.7% favorability toward the small business; each of the individual conditions was within 6 points of that mean.<sup>71</sup> Given the sample size for each condition, the only fair conclusion that can be drawn from these results is that readers primed to favor the small business ended up favoring the small business, regardless of whether the prime was positive or negative and regardless of whether the prime dealt with policy or personal characteristics.

On the government side, however, there are sharp differences among the four different conditions. The mean for all four conditions showed that 47.1% of all respondents leaned in favor of small business by the end of the test.<sup>72</sup> Those who read positive themes broke in roughly the same proportion: 50.0% of those who read positive policy statements ended up leaning toward the small business, while 47.4% of those who read positive personal characteristics themes ended up leaning toward the small business.<sup>73</sup>

But something important seems to be happening with the negative themes. The only condition that resulted in a strong win for the government was the negative policy condition,<sup>74</sup> where respondents favored the government by a margin of 62.5% to 25.0%. The weakest condition for the government was the negative characteristics condition,<sup>75</sup> where 23.5% of the respondents favored the government compared to 64.7% favoring the small business.<sup>76</sup> Why was one negative theme so successful and the other so toxic?

It may be that the negative characteristics theme (an attack by the government against the character of the small business) may have

71 See *supra* Table E.

72 See *supra* Table F. Note however that the control condition (a Preliminary Statement that simply recited the procedural posture of the case without setting forth any theme) resulted in only 33.3% of respondents leaning toward the small business, while 42.9% leaned toward the government. It is unclear why reading Preliminary Statements slanted toward the government caused respondents to shift more toward the small business. See *supra* Table D.

73 See *supra* Table F.

74 Condition 2, HUD's negative policy condition, included this statement of theme: "If Defendant is required to provide free access to all incorporated standards to entities such as Plaintiff, it is unlikely that private standards organizations would continue to develop those standards, and the government would be left trying to develop standards on its own, which would be financially prohibitive." Chestek, *infra* Appendix A at 36.

75 Condition 4, HUD's negative personal-characteristics condition, included this statement of theme: "Although those five standards were available for purchase from ANSI at a cost of only \$2,419, Plaintiff chose not to purchase the standards and bore the risk of failing to comply with them. Now faced with paying a \$250,000 fine imposed by Defendant, Plaintiff belatedly seeks to avoid its responsibility by seeking a declaration by this Court that Defendant's regulations violate the Due Process Clause of the 14th Amendment." *Infra* Appendix A at 37.

76 See *supra* Table F.

triggered another psychological phenomenon: the so-called “underdog effect.”<sup>77</sup> One group of psychologists defined that effect as “people’s tendency to support or root for an entity that is perceived as attempting to accomplish a difficult task, and who is not expected to succeed against an explicit or implicit advantaged opponent.”<sup>78</sup> This may be “because we are likely to experience and observe numerous underdog challenges, [and therefore] may identify with the struggles of overcoming such challenges and with others who face similar obstacles.”<sup>79</sup> Since the negative characteristics theme consisted of the federal government (a large and powerful entity) criticizing a small business, it seems likely that an underdog effect may have been triggered.

But no such effect was observed in the negative policy condition, because policy is different. Policy is forward-looking. Policy arguments seek to maximize social benefit for all. Professor Michael Smith defines policy arguments as

an argument made by a legal advocate to a court that urges the court to resolve the issue before it by establishing a new rule that advances or protects a particular social value implicated by the issue.<sup>80</sup>

Some of these arguments are based on future implications only, while others are based on both present and future implications.<sup>81</sup> But whether a particular argument is future-only or present and future, there is no “underdog” present. “Society” includes all of us, including the judge. Thus, when the government points out that a particular result would be bad for society, it is arguing that it is bad for all of us.<sup>82</sup>

#### D. Negative Policy Arguments Sometimes Work Better Than Positive Ones

One of the more intriguing results of the study was that while negative policy themes worked well for the government, a positive policy theme did not.<sup>83</sup>

<sup>77</sup> See, e.g., JongHan Kim et al., *Rooting for (and Then Abandoning) the Underdog*, 38 J. OF APP. PSYCH. 2550 (2008).

<sup>78</sup> *Id.* at 2551.

<sup>79</sup> *Id.* at 2552.

<sup>80</sup> Michael R. Smith, *The Sociological and Cognitive Dimensions of Policy-Based Persuasion*, 22 BROOKLYN L. REV. 35, 39 (2013).

<sup>81</sup> *Id.* at 54–62.

<sup>82</sup> Note that negative policy arguments were also effective for the small business, which won 66.7% of the time when arguing that HUD’s policy arguments would harm small businesses. But it is not clear why the small business’s positive policy arguments were nearly equally as effective: the small business won 61.9% of the time in that condition. See *supra* Table F. Perhaps this is a different manifestation of the underdog effect, in which the small business tends to win in every case against the much larger government.

The finding that negative policy arguments (i.e., that a ruling for one party harms society) work better than positive policy argument (i.e. that a ruling for one party is good for society) probably does not come as a surprise to Prof. Smith, who predicted this result at the Cognitive Bias Symposium held at Brooklyn Law School in 2013.<sup>84</sup> After analyzing several common cognitive phenomena (loss aversion, the endowment effect and the negativity bias), Prof. Smith recommended that advocates “phrase their policy arguments in terms of avoiding loss.”<sup>85</sup>

My study appears to confirm Prof. Smith’s advice. Both negative policy conditions (conditions 1 and 2) resulted in more-favorable results for the advocate than the corresponding positive policy conditions (conditions 6 and 7). On the small-business side, the negative policy condition produced favorable results in 66.7% of respondents, while the positive policy condition produced favorable results 61.9% of the time (virtually the same).<sup>86</sup> For the government, the results were even more dramatic: the negative policy condition produced favorable results 62.5% of the time, but the positive policy condition produced favorable results only 33.3% of the time.<sup>87</sup> This is likely because a negative policy argument (the opponent’s preferred outcome is bad policy) seeks to prevent future harm, while a positive policy theme (my client’s preferred outcome is good policy) seeks to preserve the status quo. Prof. Smith would argue that seeking to prevent future harm (the negative policy argument) is likely a more powerful claim to a risk-averse tribunal.<sup>88</sup>

Prof. Smith’s prediction that stating a policy argument in the negative would be more powerful than stating it in the positive does not, however, explain why a negative attack on the personal characteristics of the opponent sometimes is less effective than making a positive claim about the worthiness of your client. One possible answer may be that negative attacks on your opponent reflect bad ethos. Negative attacks on the

<sup>83</sup> Negative policy themes resulted in a favorable leaning for the government in 62.5% of respondents, but only 33.3% of the time for positive policy themes. See *supra* Table F. For the small business, however, both types of policy arguments worked equally well (61.9% success rate for positive policy arguments and 66.7% success for negative policy arguments). See *supra* Table E.

<sup>84</sup> Likewise, it probably does not surprise the psychology professors and students who attended the Psychology of Persuasion conference jointly sponsored by the University of Wyoming College of Law and the University of Wyoming Department of Psychology in September of 2015. When I presented some preliminary findings at that conference, many of the psychology professors in the audience predicted that the negative personal theme would likely backfire against the government. Ken Chestek, *Is Bad Stronger than Good in Selecting a Persuasive Theme? An Empirical Investigation*, Psychology of Persuasion Conference, Sept. 19, 2015.

<sup>85</sup> Smith, *supra* note 80, at 77–78.

<sup>86</sup> See *supra* Table E.

<sup>87</sup> See *supra* Table F.

<sup>88</sup> Smith, *supra* note 80, at 63–65.

personal characteristics (essentially ad hominem attacks) can be perceived by the audience (the judge) as petty.<sup>89</sup> However, negative policy arguments are not perceived as petty; they are more likely perceived as good ethos (the speaker is smart enough to foresee the future implications of a decision, and is able to effectively warn the judge in time to avoid those negative future implications).<sup>90</sup>

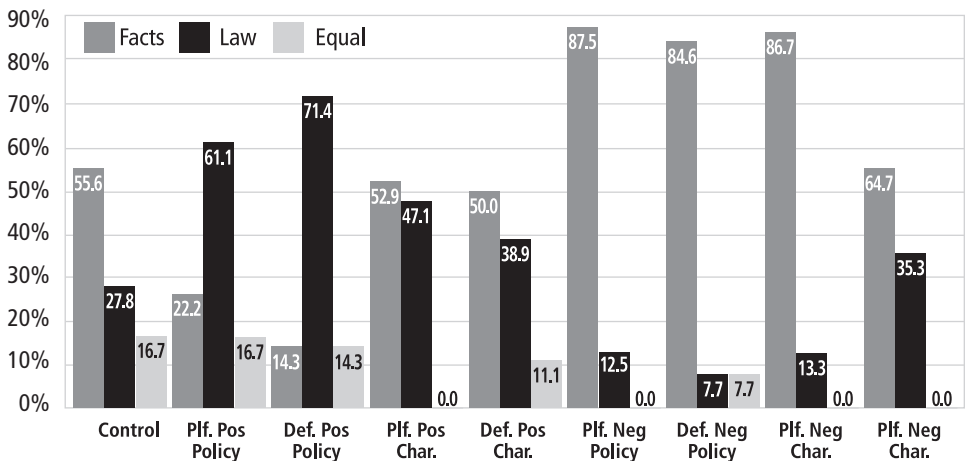
**E. The Negativity Bias Can Shape a Judge’s Thinking about What the Case Is About.**

One of the most surprising findings from the study is that judges tended to think differently about the case depending on whether they read a positive or negative theme in the Preliminary Statement. As noted above, judges who read a positive theme (whether policy or personal characteristics, regardless of which side wrote the statement) cited the law as the basis for their leanings more often than they cited the facts. By a much wider margin, those who read a negative theme cited the facts as the basis for their leanings more frequently than they cited the law.<sup>91</sup>

There were some differences in these results depending upon the individual conditions each judge read. Table K reflects this more nuanced data.

As shown below, judges who read a negative theme very strongly cited facts more often than law as the basis for their leanings; this effect was fairly consistent across all four of the negative themes.<sup>92</sup> In contrast, judges who read a positive policy condition strongly cited the law as the basis for their leanings; judges who read a positive characteristics theme were pretty evenly divided between citing facts and law as the basis for their leanings.<sup>93</sup>

**Table K: Detail Basis of Decision**





What might account for the fact that negative themes caused judges to think more about facts than did positive themes? One possibility is that negative themes suggest to the judge that there is a fundamental disagreement between the parties about something basic in the case: either a dispute about what happened, or a dispute about whether the law covers the dispute at all. Both of those possibilities mean that the court needs to pay attention to the facts to determine what is going on in the case. A positive theme, however, may suggest that the parties are in relative agreement about what happened, and that only legal questions remain.<sup>94</sup> This hypothesis seems to be confirmed by the fact that, in Table K, positive policy themes led judges to think more about the law in significant numbers, while positive personal characteristics themes led to a much more even split between law and fact-based reasoning.

Another possibility is that reasoning with the law (i.e., *logos* reasoning) is inherently a System 2 activity, whereas reasoning with facts (which engages the reader at more of a *pathos* level) might invoke System 1–type reasoning.<sup>95</sup> Since the negativity bias is most powerful with System 1 thinking, a negative theme may cause the reader to recall the facts of the case more quickly.<sup>96</sup>

89 It may also create a negative mood in the audience; or, as Prof. Smith might say, poor “medium mood control.” MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING*, 29–31 (3d ed. 2013). As Prof. Smith suggested to me in discussing this article, negative attacks on the personal characteristics of the opposing party are likely to put the judge in a bad mood, which may make the message less persuasive.

90 Thanks to Prof. Michael Smith and Prof. Steve Johansen, who both suggested this theory.

91 See *supra* Table J. Table J reveals that in positive theme conditions, respondents cited the facts 35.8% of the time, compared to the law 53.7% of the time. In negative theme conditions, respondents cited the facts 80.3% of the time, compared to the law only 18% of the time.

92 The four negative conditions produced these results:

	Facts	Law
Plaintiff negative policy	87.5%	12.5%
Defendant negative policy	84.6%	7.7%
Plaintiff negative characteristics	86.7%	13.3%
Defendant negative characteristics	64.7%	35.3%

93 The four positive conditions produced these results:

	Facts	Law
Plaintiff positive policy	22.2%	61.1%
Defendant positive policy	14.3%	71.4%
Plaintiff positive characteristics	52.9%	47.1%
Defendant positive characteristics	50.0%	38.9%

94 This theory was suggested to me by one of the study participants. In April 2016 I was invited to give a presentation to the Michigan Judicial Institute reporting preliminary findings from this study, including the finding that negative themes tended to cause judges to think more about the facts while positive themes tended to cause judges to think more about the law. Several members of the audience had previously participated in the study, and during the question-and-answer portion of the presentation one of the participants suggested this possibility.

95 See *supra* V(A).

A deep dive into the data suggests one avenue for further inquiry. As noted above,<sup>97</sup> five appellate judges responded to the survey. Of those five, four focused on the law as the basis for their leanings, while only one focused on the facts,<sup>98</sup> probably reflecting the reality that appeals generally focus on whether the trial court made an error of law. But a data set of only five judges was insufficient to do any analysis of whether or how positive or negative themes influenced the thinking of appellate judges. Additional follow-up studies focusing on appellate judges might be helpful here.

## VI. Conclusion

Like most strategic decisions facing a lawyer, the choice to use a negative theme is fairly complex. My study suggests that if you believe you have strong facts, a negative theme might cause the court to look at the facts more closely. If you think the law is your strongest argument, a positive theme my prompt the court to look more closely at the law.

My study also confirms empirically the theoretical claim that policy arguments are more powerful if stated in the negative (that is, in terms of avoiding loss rather than providing a gain). And it provides strong support for the notion that, if court rules permit you to write an Introduction or a Preliminary Statement, you should always do so, because such statements can have a powerful impact on how the reader understands the rest of what you write.

All of these conclusions are tempered, of course, by the inherent limitations of a study like this. Primary among those limitations is the artificial nature of the test. In order to isolate the variable of negative vs. positive themes, I had to write Preliminary Statements that employed only one

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<sup>96</sup> Thanks to Prof. Lance Long for suggesting this possible explanation. Note also that the research on priming suggests that priming has a significant effect on memory. Prof. Kathy Stanchi describes an experiment performed by Thomas K. Srull and Robert S. Wyer Jr., psychologists at the University of Illinois Urbana-Champaign, in which test participants were primed with seemingly random words, then asked to evaluate the character traits of a hypothetical person named Donald in several neutral situations. Subjects primed with negative words overwhelmingly assigned the character trait “hostile” or “aggressive” to Donald, while those primed with positive words assigned the trait “kind” or “pleasant” to Donald. That priming even affected new information given about Donald as much as twenty-four hours later; that is, the subjects remembered the priming and used it to interpret and encode new information. Stanchi, *supra* note 66, at 333–34 (citing Thomas K. Srull & Robert S. Wyer, Jr., *The Role of Category Accessibility in the Interpretation of Information about Persons: Some Determinants and Implications*, 37 J. OF PERSONALITY & SOC. PSYCHOL. 1660, 1670 (1979)).

<sup>97</sup> See *supra* note 29.

<sup>98</sup> Trial judges tended to report that their thinking about the case was influenced more by the facts by a margin of 57.8% (facts) to 31.3% (law), compared to the five appellate judges who reported that they were influenced more by the facts by a margin of 20% (facts) to 80% (law). Chestek, *supra* note 29. This is not a surprising result given the different roles that trial judges and appellate judges have, but because of the small number of appellate judges in the sample, these results do not appear to be significant.

such theme, often in an exaggerated form. In a real court case, advocates will not be limited to a single theme. However, hopefully this study will provide some basis for advocates to choose if, when, and how to “go negative”:

- Priming matters! Whatever theme you choose (positive or negative), be sure it is expressed in some fashion in a Preliminary Statement (or Introduction) to your brief.
- If you want the court to focus on the facts of your case, choose a negative theme.
- Always state policy arguments in terms of avoiding negative outcomes.
- If you represent a more powerful party against a relatively weaker policy, going negative may backfire.

In other words, to borrow a catchphrase: let’s be careful out there!<sup>99</sup>

## Appendix A

### Test Condition 1 (Rochford, Negative Policy)

After an administrative investigation, Defendant, United States Department of Housing and Urban Development imposed a fine of \$250,000 against Pilot Manufactured Homes, Inc., (“Pilot”) after a fire destroyed one of Pilot’s manufactured homes. The fine arises from HUD’s finding that a furnace manufactured by Plaintiff, Rochford Heating, Inc., and installed in the home, did not comply with Defendant’s regulations on manufactured home safety. Pilot has made a claim against Plaintiff for indemnification.

The Defendant’s regulations incorporate by reference 214 standards adopted by 35 different private agencies, all of which claim a copyright in those standards. The incorporated standards are only available by purchase from the private agencies, and noncompliance with those proprietary standards results in civil penalties. Purchasing the entire set of private standards applicable to manufactured homes would have cost Plaintiff more than \$25,000.

The private standards place a significant financial burden on small businesses such as Plaintiff. Defendant failed to make the standards reasonably available to persons in Plaintiff’s position, because it allows agencies to earn a profit from the sale of private standards, which have the

99 Sgt. Phil Esterhaus (as played by Michael Conrad), *Hill Street Blues* (1981–84), [https://en.wikipedia.org/wiki/Michael\\_Conrad](https://en.wikipedia.org/wiki/Michael_Conrad).

force of law. Failure to provide entities such as Plaintiff with free or minimal cost access to the standards unduly burdens small businesses and thereby reduces competition in the marketplace. It is against public policy for private entities to “copyright the law.” Therefore, Plaintiff seeks declarative relief holding that Defendant’s regulations are unconstitutional because they deny Plaintiff due process of law under the 14th Amendment to the United States Constitution, and requests that this Court grant Plaintiff’s motion for summary judgment.

### **Test Condition 2 (HUD, Negative Policy)**

Plaintiff, Rochford Heating, Inc., sold more than 1,500 furnaces to Pilot Manufactured Homes, Inc., (“Pilot”), a builder of manufactured homes. One of Pilot’s homes was destroyed in a fire and resulted in serious injuries to an occupant of that home. After an investigation, Defendant, United States Department of Housing and Urban Development determined that Plaintiff’s furnaces violated five standards on manufactured home safety, and therefore imposed a \$250,000 fine on Pilot. Pilot in turn sought indemnification from Plaintiff.

All five standards violated by Plaintiff were promulgated by the American National Standards Institute, a private standards organization. Those standards are incorporated by reference in the Defendant’s regulations, pursuant to 24 C.F.R. § 3280.4 (2008). Purchasing those five standards from ANSI would have cost Plaintiff only \$2,419.

It was Plaintiff’s responsibility, as a business owner and supplier of goods that are intended to be in manufactured homes, to gain access to all applicable standards through the private agencies provided. If Defendant is required to provide free access to all incorporated standards to entities such as Plaintiff, it is unlikely that private standards organizations would continue to develop those standards, and the government would be left trying to develop standards on its own, which would be financially prohibitive. Therefore, this Court should declare that the Defendant’s regulations comply with the Due Process Clause of the 14th Amendment because the incorporated standards were made known, and were reasonably available, to entities such as Plaintiff. The Court should therefore grant Defendant’s motion for summary judgment.

### **Test Condition 3 (Rochford, Negative Characteristics)**

The Defendant, United States Department of Housing and Urban Development, publishes safety regulations for the construction of manufactured homes. Those regulations incorporate by reference 214 different private standards, promulgated by 35 different private agencies, all of

which claim a copyright in those standards. The private standards are only available to manufacturers by purchasing them from the private agencies. To purchase all 214 standards would cost Plaintiff, Rochford Furnaces, Inc., more than \$25,000, despite the fact that its entire gross profit generated in the past five years from the sale of these furnaces amounted to only \$74,195.

Incorporating private standards into public law allows Defendant to avoid the responsibility of creating fair and public standards. Allowing private agencies with close ties to the industries for whom the standards are intended raises serious questions as to whether the standards are reasonable or are designed to favor large companies over smaller ones like the Plaintiff.

Defendant is now seeking to impose a \$250,000 fine because it claims a furnace manufactured by Plaintiff did not comply with a proprietary, copyrighted standard that is not freely available to the public. Defendant could easily insist that private standards agencies provide free online access to any proprietary standard that Defendant incorporates by reference in its regulations.

For these reasons, this Court should declare Defendant's regulations to be in violation of the Due Process Clause of the 14th Amendment and grant Plaintiff's motion for summary judgment.

#### **Test Condition 4 (HUD, Negative Characteristics)**

Plaintiff, Rochford Heating, Inc., builds furnaces for manufactured homes. One of the furnaces it built was incorporated into a manufactured home constructed and sold by Pilot Manufactured Homes, Inc. ("Pilot"). That furnace caused a catastrophic fire, resulting in serious injuries to the occupants of that home. An investigation by the Defendant, United States Department of Housing and Urban Development ("HUD") found that the furnace did not comply with five different standards promulgated by the American National Standards Institute ("ANSI"), incorporated by reference into HUD's safety regulations for manufactured homes.

Although those five standards were available for purchase from ANSI at a cost of only \$2,419, Plaintiff chose not to purchase the standards and bore the risk of failing to comply with them. Now faced with paying a \$250,000 fine imposed by Defendant, Plaintiff belatedly seeks to avoid its responsibility by seeking a declaration by this Court that Defendant's regulations violate the Due Process Clause of the 14th Amendment. Due to Plaintiff's disregard in failing to obtain copies of the standards, Defendant requests this Court grant its motion for summary judgment.

**Test Condition 5 (Neutral Control)**

Plaintiff, Rochford Heating, Inc., brought this action for declarative relief against Defendant, United States Department of Housing and Urban Development, after a furnace it manufactured and sold to Pilot Manufactured Homes, Inc. (“Pilot”), malfunctioned and caused a fire. After an investigation, Defendant determined that the furnace violated five standards published by the American National Standards Institute (“ANSI”), which were incorporated by reference in Defendant’s safety regulations for manufactured homes. Defendant fined Pilot \$250,000 for noncompliance, and Pilot in turn sought indemnification from Plaintiff. Plaintiff seeks declaratory relief voiding the proposed fine on the basis that Defendant’s regulations deny Plaintiff due process of law under the Fourteenth Amendment to the United States Constitution. The only way Plaintiff could obtain copies of the standards was by purchasing them from ANSI, a private entity. Both parties have moved for summary judgment.

**Test Condition 6 (Rochford, Positive Policy)**

Plaintiff, Rochford Heating, Inc., brought this action for declaratory judgment to require Defendant, United States Department of Housing and Urban Development to provide free or low-cost access to any standards Defendant incorporates by reference in its regulations pertaining to manufactured homes. Defendant is attempting to impose a fine of \$250,000 because a furnace manufactured by Plaintiff and installed into a manufactured home failed to comply with several copyrighted standards published by the American National Standards Institute (“ANSI”). Those standards, which can only be obtained by purchasing them from ANSI, were incorporated by reference into Defendant’s regulations for manufactured homes.

Public policy demands that standards which have the force of law should be freely available to the public. Free public access to the standards will benefit society by ensuring that manufacturers such as Plaintiff are aware of the standards, and thereby encourage compliance. Moreover, since the standards are intended to protect the public, free access to those standards would allow members of the public to detect and help enforce violations of those standards. Therefore, this Court should declare Defendant’s regulations for manufactured homes unconstitutional as violating the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and grant Plaintiff’s motion for summary judgment.

**Test Condition 7 (HUD, Positive Policy)**

Defendant, United States Department of Housing and Urban Development, promulgates manufactured home construction and safety standards to ensure safety to consumers. This regulation incorporates by reference many standards developed by industry groups and private standards organizations, thereby benefitting from the specialized knowledge and expertise possessed by those groups. Defendant only incorporates standards created by independent agencies, such as the American National Standards Institute (“ANSI”), and similar groups that promote public safety rather than industry convenience.

Plaintiff, Rochford Heating, Inc., seeks a declaration that Defendant’s regulations do not provide due process of law and therefore violate the Due Process Clause of the Fourteenth Amendment because the only way Plaintiff could obtain the incorporated standards was by purchasing them from ANSI. However, allowing standards agencies to generate revenue through the sale of their standards at reasonable prices encourages these agencies to continue to develop standards, thereby relieving the government of the substantial burden to develop such standards on its own. Moreover, relying on private agencies with special expertise in particular industries insures that the standards are relevant and suitable for those industries, and more likely to promote safety than any standard created by Defendant. Defendant therefore requests that this Court grant its motion for summary judgment.

**Test Condition 8 (Rochford, Positive Characteristics)**

Plaintiff, Rochford Heating, Inc., is a small business entity. It works with Pilot Manufactured Homes, Inc., (“Pilot”), which manufactures affordable homes for low-income individuals. Plaintiff supplies Pilot with furnaces specially designed to fit Pilot’s needs, and sells those furnaces to Pilot at less than \$1,000 per unit. To date, it has sold 1,562 units to Pilot and has generated a gross profit of only \$74,195 from those sales.

Unfortunately, one of the furnaces sold by Plaintiff and installed in one of Pilot’s manufactured homes was involved in a fire, resulting in personal injuries to one of Pilots’ customers. An investigation by Defendant, United States Department of Housing and Urban Development determined that the failed unit did not comply with Defendant’s safety standards for manufactured homes. As a result, Defendant seeks to impose a \$250,000 fine on Pilot, which in turn seeks indemnification from Plaintiff.

The standards Defendant seeks to enforce were promulgated by private standards agencies and incorporated by reference in Defendant’s

regulations. Those regulations incorporate 214 separate standards promulgated by 35 different private standards agencies, and are available only to individuals and businesses that agree to purchase the standards from the private agencies. The total cost for Plaintiff to purchase all 214 standards would have been in excess of \$25,000.

If a governmental agency wishes to incorporate private standards in its binding regulations, it should insist that those agencies make the standards freely available to the public, including those small businesses who are expected to comply with those standards. Doing so would have allowed Plaintiff to obtain copies of all applicable standards and have a fair chance of competing with larger businesses, which can spread the cost of compliance over a much larger number of units sold. Accordingly, this Court should declare that Defendant's regulations are unconstitutional as violating the Due Process Clause of the Fourteenth Amendment and grant Plaintiff's motion for summary judgment.

### **Test Condition 9 (HUD, Positive Characteristics)**

To ensure the safety of manufactured homes to consumers, Defendant, United States Department of Housing and Urban Development, promulgates regulations that manufacturers must comply with. Defendant's regulations incorporate by reference numerous standards written by 35 different private standards agencies, all of which have special expertise in various aspects of manufactured home construction. Defendant does not have sufficient expertise in all of those aspects, nor the manpower to independently create all of the necessary safety standards, so its reliance on private standards agencies is reasonable and effective.

Defendant requires that the standards it incorporates by reference be made reasonably available to the public, and monitors the agencies whose standards are incorporated to insure that the prices those agencies charge are not prohibitive.

Plaintiff, Rochford Heating, Inc., manufactures furnaces installed in homes built by Pilot Manufactured Homes, Inc. ("Pilot"). When one of those furnaces caused a catastrophic fire in a home sold by Pilot, Defendant determined that the furnace failed to comply with its safety regulations, and imposed a fine on Pilot. Plaintiff, which is contractually obligated to indemnify Pilot for Plaintiff's failure to comply with Defendant's regulations, now seeks a declaration that Defendant's regulations violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and are therefore unconstitutional. Because incorporating private standards insures that the safety regulations



are comprehensive and reasonable, and because the harm which resulted from Plaintiff's failure to comply with those standards is exactly the sort of harm the regulations are intended to prevent, this Court should deny relief to Plaintiff and grant Defendant's motion for summary judgment.

## Appendix B

The following is the standardized Stipulation of Facts that every participant read:

### Stipulation of Facts

Plaintiff and Defendant in the above cause stipulate to the following facts. The parties agree that no further proof of such facts is necessary, and that the stipulated facts may be used in evidence and argument of counsel as though duly proven through admissible evidence. Both parties, however, reserve the right to dispute the relevance of any of these facts. The facts stipulated are as follows:

1. Defendant, United States Department of Housing and Urban Development has promulgated Manufactured Home Construction and Safety Standards. 24 C.F.R. § 3280.1 (2008) [hereinafter Regulation] (stating the regulation covers "all equipment and installations in the design, construction, transportation, fire safety, plumbing, heat-producing and electrical systems of manufactured homes which are designed to be used as dwelling units").
2. The Regulation incorporates by reference various standards promulgated by private organizations, which "are available for purchase from the organization that developed the standard . . ." 24 C.F.R. § 3280.4 (2008). Any violations of the incorporated standards may result in civil penalties.
3. The Regulation incorporates 214 privatized standards, promulgated through 35 different agencies.
4. Pilot Manufactured Homes, Inc. ("Pilot"), manufactures homes that are covered by the Regulation, and qualifies as a manufacturer for purposes of 24 C.F.R. § 3280.2.
5. Between 2010 and 2015, Pilot purchased from Plaintiff, Rochford Heating, Inc., 1,562 mobile home furnaces, which Pilot installed in its manufactured homes. Plaintiff has generated a net profit of \$74,195 from the sale of those heaters.

6. The furnaces are manufactured specifically to fit the Pilot home design, and are not sold to any other home manufacturer.
7. On January 30, 2016, a home manufactured by Pilot, which contained a furnace of Plaintiff was destroyed by fire, severely injuring one of the occupants after being delivered to a customer in Tenspot, West Dakota.
8. John Smith, a fire marshal of the Tenspot Volunteer Fire Department, determined the fire was caused by a malfunction of the furnace manufactured by Plaintiff.
9. Further investigation by Defendant revealed that the furnace failed to comply with the Regulation set forth in 24 C.F.R. § 3280.4.
10. After the investigation, Defendant fined Pilot \$250,000 on the basis that the furnaces it purchased from Plaintiff did not comply with five standards incorporated into the Regulation by reference: ANSI Z21.15b-2013/CSA 9.1b-2013 (R2014), ANSI LC 1-2014/CSA 6.26-2014, ANSI Z21.10.1-2014/CSA 4.1-2014, ANSI Z21.21-2012/CSA 6.5-2012, and ANSI Z21.40.1-1996/CSA 2.91-M1996 (R2012).
11. Pilot has sought indemnification for the fine from Plaintiff based on the contract between those parties.
12. Plaintiff admits that its furnaces do not comply with the standards specified in paragraph 10, but denies that the failure to comply with the standards caused the fire described in paragraph 7. Rather, Plaintiff claims that the furnace was installed improperly by Pilot, or was modified or misused by the owner of the home, which caused the fire described in paragraph 7.
13. The standards specified by Defendant listed in paragraph 10 are only available by purchase in hard copy, or electronic form, from the American National Standards Institute ("ANSI") at the prices listed below.
 

a. ANSI Z21.15b-2013/CSA 9.1b-2013 (R2014)	\$ 90
b. ANSI LC 1-2014/CSA 6.26-2014	\$376
c. ANSI Z21.10.1-2014/CSA 4.1-2014	\$680
d. ANSI Z21.21-2012/CSA 6.5-2012	\$404
e. ANSI Z21.40.1-1996/CSA 2.91-M1996 (R2012)	\$869
14. All of the standards listed in paragraph 13 are copyrighted by ANSI.

15. None of the standards listed in paragraph 13 were published in the Federal Register. However, HUD did receive the approval of the Director of the Federal Register to incorporate those standard by reference in 24 C.F.R. § 3280.4.
16. Defendant periodically reviews the prices charged by all agencies whose standards are incorporated by reference in Defendant's Regulation to insure that the prices are not prohibitive. Defendant retains the right to amend the Regulation to eliminate one or more of the incorporated standards in the event it determines that the prices charged are prohibitive.
17. The prices charged by ANSI exceed the cost of printing or making those standards available electronically. The standards are not available in public libraries or online without paying the specified fee to ANSI.
18. Plaintiff estimates that purchasing hard copies of, or online access to, all of the 214 individual standards incorporated by reference in the Regulation would cost in excess of \$25,000.
19. Plaintiff did not purchase access to the standards through ANSI, which were incorporated in the Regulation by Defendant.
20. Plaintiff filed this action against Defendant seeking a declaration that the Regulation is unconstitutional because the standards incorporated by reference are not "reasonably available" to Plaintiff pursuant to 5 U.S.C. § 552(a)(1) (2009). Therefore Plaintiff seeks an order rescinding the \$250,000 fine, imposed on Pilot but which Plaintiff is contractually obligated to indemnify.

Signed and agreed to this \_\_\_\_\_ day of \_\_\_\_\_, 2016.